In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, pp. 5-11) is reported at 167 Ct. Cl. 598, 337 F. 2d 651.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1966 (App. B, *infra*, pp. 12-13). On

February 24, 1967, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 1, 1967. We invoke the jurisdiction of this Court under 26 U.S.C. 1255(1).

STATUTES AND REGULATIONS INVOLVED

Sections 901(a) and (b)(1) and 903 of the Internal Revenue Code of 1954, and Section 1.903-1 of the Treasury Regulations (1954 Code), are printed in Appendix C, *infra*, pp. 14-16.

QUESTION PRESENTED

The Internal Revenue Code of 1954 permits taxpayers to credit against their income tax any foreign income tax (§ 901(b)(1)) or "tax paid in lieu of a tax on income * * * otherwise generally imposed by" the foreign country (§ 903).[1] The question presented is whether taxes imposed by Canada and its provinces on the premiums received by life insurance companies are taxes "in lieu of" income taxes within the meaning of the latter provision.

STATEMENT

Respondent, a mutual life insurance company incorporated in the State of New Jersey, conducted business in Canada and claimed credits against its federal income tax liability for premiums taxes paid to the Dominion of Canada and the Province of Quebec for the years 1950 through 1956, and to the Prov-

[1] The 1939 Code contains similar provisions (see § 131(a) and (h)), which are applicable to some of the taxable years involved in this case.

ince of Ontario for the years 1950 and 1951 (App. A, *infra*, pp. 5-6). In this action for refund of federal income tax payments, the Court of Claims held (App. A, *infra*, pp. 10-11) that the premiums taxes were "in lieu of" the income taxes imposed by the various Canadian jurisdictions, within the meaning of Section 131(h) of the Internal Revenue Code of 1939 and Section 903 of the Internal Revenue Code of 1954 (App. C, *infra*, p. 15), and hence that Prudential was entitled to credit its premiums-tax payments against its federal income tax liability, resulting in a refund to Prudential of more than $6 million (see App. B, *infra*, pp. 12-13). The reasoning of the Court of Claims was the same as in its decision in *Equitable Life Assurance Soc.* v. *United States*, 366 F.2d 967, pending on petition for a writ of certiorari, No. 1144, this Term, a case involving the identical question.

REASON FOR GRANTING THE WRIT

Like No. 1144, this Term, *United States* v. *Equitable Life Assurance Soc.*, this case presents the question whether an American mutual life insurance company may credit premiums taxes paid in Canada against its federal income tax liability because it is exempt from Canadian income taxes. Our reasons for believing that the question is a substantial one meriting review by this Court are set forth in our petition for certiorari in No. 1144 and need not be repeated here.[2]

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[2] We have served a copy of that petition on the instant respondent.

CONCLUSION

Since the issue here is identical to that in No. 1144, we believe it would be appropriate for the Court to defer action on the instant petition until final disposition of No. 1144 and then to dispose of the instant petition summarily in conformity with the Court's disposition of No. 1144.

Respectfully submitted.

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MARCH 1967.

APPENDIX A

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

THE UNITED STATES

[Nos. 202-63, 247-63, 248-63, 249-63, 250-63, 251-63 and 252-63. Decided October 16, 1964]

On Plaintiff's and Defendant's Motions for Partial Summary Judgment

Francis A. Goodhue, Jr. for plaintiff. *Arthur E. Schmauder, Frank G. Koch; John H. Perkins, Jr., Peter J. Sturtevant, Dewey, Ballantine, Bushby, Palmer & Wood* of counsel.

Martin B. Cowan, with whom was *Assistant Attorney General Louis F. Oberdorfer* for defendant. *C. Moxley Featherston, Lyle M. Turner, Philip R. Miller* and *Thomas A. Troyer* on the brief.

Before JONES, *Senior Judge,* WHITAKER, *Senior Judge,* LARAMORE, DURFEE, and DAVIS, *Judges.*

DURFEE, *Judge,* delivered the opinion of the court:

These are seven suits by the taxpayer, a mutual life insurance company, incorporated in the State of New Jersey, seeking recovery of alleged overpayments of Federal income taxes. The actions have been consolidated by order of the court. Both parties have moved for partial summary judgment on one of the issues involved, i.e., whether or not plaintiff is entitled to a foreign tax credit under sections 131 (a) and (h), and 205 of the 1939 Internal Revenue Code, and sections 841, 901, and 903 of the 1954 Internal Revenue Code.

During the years 1950 and 1951, plaintiff paid a tax, imposed by the Provinces of Ontario and Quebec, of two percent of the gross proceeds of insurance premiums collected in those years from policyholders residing in the respective provinces. From 1952 until 1956, plaintiff paid the same tax to the Province of Quebec only, Ontario in 1952 having entered into a "Tax Rental Agreement" with the Dominion of Canada, whereby Ontario agreed to refrain from levying certain taxes, including the premiums tax, in return for compensation by the Dominion. Plaintiff paid to the Dominion of Canada the same two percent tax on premiums collected in 1950 and 1951 from policyholders residing in Canada outside of the Provinces of Ontario and Quebec, and from 1952 to 1956 from policyholders residing in Canada outside the Province of Quebec. By payment of these premiums taxes, plaintiff was excused from payment of Canadian income taxes by express provisions of law within each of the three Canadian jurisdictions.

Section 131(a), as amended, of the 1939 Internal Revenue Code, the precursor of section 901 of the 1954 Code, provided a tax credit on the income tax of a domestic corporation for any income taxes paid or accrued to a foreign country during the taxable year. Section 131(h) of the 1939 Code, the precursor of section 903 of the 1954 Code, defined the term income taxes as used in section 131(a) as including a tax paid in lieu of a tax upon income imposed by such foreign country. It is plaintiff's contention in this case that premiums taxes paid by it to the Provinces of Ontario and Quebec and to the Dominion of Canada constituted a tax paid in lieu of an income tax, and therefore, that plaintiff should have been entitled to a credit on its United States income taxes.

This court in *Prudential Insurance Company of America* v. *United States*, 162 Ct. Cl. 55, 319 F. 2d

161 (1963), a case involving the same parties and identical issue, but pertaining to a different tax year (1949), held that such premiums payments were indeed taxes paid in lieu of income taxes. It remains for us now, in this case, to examine the applicable Canadian statutes from the years 1950 to 1956, and compare them to the statutes in effect in 1949, the year in issue in the previous *Prudential* case. If such a comparison shows the statutes to be identical or substantially the same, and if defendant has shown no changes in related factors or circumstances we must, under the well established rule of *stare decisis*, grant plaintiff's motion. If, on the other hand, the statutes are not the same, or if defendant has effectively shown the existence of certain related factors not known at the time of the previous case, then such nuances and/or new evidence must be evaluated before final disposition of these motions.

A reading of the Quebec statute immediately reveals the fact that the statute applicable in 1949, and the statute in effect from 1950 to 1956, were one and the same. The premiums tax in both 1949, and 1950 to 1956, were imposed by subdivision 3 of section 3 of the Quebec Corporations Tax Act (11 Geo. VI (1949), c. 33)). Section 6 of the same statute levied a seven percent income tax on certain enumerated companies. Insurance companies were not among those companies made subject to the income tax by section 6. *Cf. Prudential* case, *supra*, p. 61.

The Ontario statute applicable to income and premiums taxes in 1950 and 1951 was not the same statute that we interpreted in our prior decision. In the prior decision, we examined the Corporations Tax Act of Ontario [3 Geo. VI (1939), c. 10, as amended.] A new Corporations Tax Act of Ontario had gone into effect in 1950 (Rev. Stat. of Ont., 1950, c. 72.) While the

statutes themselves were not the same, the language of the portions of the two statutes relevant to the issues involved in the prior decision and in this case are almost identical. Section 4, subsection (1) of the 1939 Ontario Act provided that every insurance company should pay a two percent tax on life insurance gross premiums received by the company during the fiscal year from policyholders who were residents in Ontario. Section 4(1) of the 1950 Act set forth the same requirements. Section 14, subsection (1) of the 1939 Act imposed a seven percent net income tax on corporations located in Ontario. The counterpart of this section in the 1950 Act [Section 14(1)] imposed the very same seven percent tax. Finally, the specific exemption of insurance companies from paying the seven percent net income tax is found in both statutes in similar language. The exemption provision is included in section 14, subsection (3)(h) of the 1939 Act, and in section 14(3)(i) of the 1950 Act. The interworkings of these sections of the 1939 Act were thoroughly discussed in the previous case.

An examination of the Dominion of Canada statutes applicable in the previous case, and those in effect for the years in issue in the present case, shows that the earlier statutes were again either identical or very similar to the statutes involved in this case. For the years 1950, 1951 and 1952, the premiums tax was assessed under the Dominion's Excise Tax Act (Rev. Stat. of Can., 1927, c. 179, as amended.) The Canadian income tax assessment and exemption of mutual life insurance companies were included in the Income Tax Act. [11-12 Geo. VI (1948), c. 52, as amended.] These were the same statutes involved and explained in the previous case.

Plaintiff's premiums tax was assessed for the years 1953 to 1956, under a new statute, the Excise Tax

Act (Rev. Stat. of Can., 1952, c. 100, as amended.) Its language was for all intents and purposes identical to that of its predecessor. The same may be said of the language of the new Income Tax Act (Rev. Stat. of Can., 1952, c. 148, as amended), under which corporation income taxes were assessed and under which mutual life insurance companies were exempted. It too was identical to its predecessor.

Although, as we have shown, the statutes involved in this case are identical or substantially the same as those considered in the previous case, defendant contends that the present case may be distinguished from our prior holding. The thrust of this contention is focused upon the decision of the Supreme Court of Canada in *Stanley Mutual Fire Insurance Company* v. *Minister of Internal Revenue* (1953), 1 S.C.R. 442, 53 D.T.C. 1119. Defendant cites this case for the proposition that mutual life insurance companies had been exempted from income taxes on their premiums income not because of express provisions of the statutes, but because no mutual insurance company was regarded by the courts as being a profit making concern.

The issue involved in the *Stanley Mutual* case, *supra*, was whether or not a mutual *fire* insurance company was subject to income tax for the year 1947 on an amount of cash, the excess receipts including premiums earned over disbursements, which were transferred to its reserve fund. The Court held that the surplus cash was accumulated not as profit for the company, but in furtherance of the purpose of the mutual fire insurance plan, the settlement of claims or liabilities. The surplus was then held to be non-taxable.

The decision was, therefore, limited to the question of the taxability of excess receipts of a mutual *fire*

insurance company. There is certain *dicta* in the opinion which would support defendant's contention that all mutual insurance companies were, because of their structure, incapable of making any profits. The holding of the Court does not, however, contain such a broad generalization.

In actuality, mutual insurance companies were regarded under Canadian law as profit making concerns. Investment income of incorporated resident mutual fire and casualty companies was included in computing taxable income from 1947 through the period in issue. Furthermore, the *Stanley Mutual* decision, *supra*, was overturned by the Dominion Parliament in 1954 by the clear intent expressed in the enactment of section 68A of the Income Tax Act. That amendment expressly taxed mutual casualty companies on their underwriting income. It also made such liability retroactive to 1947 if such companies were nonresidents.

In light of the fact that, except for the years involved, the issue and circumstances of this case and both the United States Statutes and the Canadian statutes pertaining to the foreign tax credit are the same in all relevant respects for the years 1950 through 1956 as they were for the year 1949 involved in the previous *Prudential* case, the law of that case must govern the disposition of these motions under the rule of *stare decisis*. There is nothing to cause the court to view the prior decision as unjust or undesirable. In fact, the Government never sought reconsideration or review of that decision. The various materials defendant presents in this case fail to demonstrate that there was not a very close connection between the imposition of the Canadian premiums taxes involved here and the failure to impose income taxes. On the contrary, we are persuaded by the history and

terms of the various Canadian taxing acts that these premiums taxes were paid "in lieu of" income taxes imposed on others.

Plaintiff's motion for partial summary judgment is, therefore, granted, and defendant's cross motion is denied. Partial judgment is entered for plaintiff, with the amount of recovery on this issue and the rights of the parties as to other issues raised by the pleadings to be determined by further proceedings pursuant to Rules 47(c) and 64(e).

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

Nos. 202-63, 247-63, 248-63, 249-63, 250-63, 251-63 and 252-63

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

v.

THE UNITED STATES

ORDER

On October 16, 1964, the court rendered an opinion holding that the plaintiff was entitled to recover on the "foreign tax credit" issues and entering judgment to that effect. The determination of the amount of recovery on such issues was reserved pending further proceedings pursuant to Rule 47(c).

On November 30, 1966, the commissioner of this court filed a memorandum report recommending that, in accordance with the opinion of the court and the stipulation of the parties regarding the amounts due the plaintiff pursuant to the court's decision and pursuant to the settlements agreed to by the parties of the other issues raised by the pleadings, judgment be entered for the plaintiff in the sums indicated below, which recommendation is adopted by the court.

IT IS THEREFORE ORDERED that judgment be and the same is entered for the plaintiff in the sum of two hundred ninety-one thousand three hundred three dollars and twenty-five cents ($291,303.25), together with interest as provided by law, in case No. 202-63, in the sum of eight hundred fifty-four thousand three hundred thirteen dollars and eighty-nine cents ($854,313.89), together with interest as provided by law, in

case No. 247-63, in the sum of one million one thousand six hundred two dollars and twenty cents ($1,001,602.20), together with interest as provided by law, in case No. 248-63, in the sum of one million sixty-three thousand sixty-three dollars and fifty-three cents ($1,063,063.53), together with interest as provided by law, in case No. 249-63, in the sum of one million thirty-seven thousand six hundred eighty-four dollars and thirty-three cents ($1,037,684.33), together with interest as provided by law, in case No. 250-63, in the sum of one million one hundred ten thousand seven hundred thirty-three dollars and fifty-one cents ($1,110,733.51), together with interest as provided by law, in case No. 251-63, and in the sum of one million one hundred forty thousand eight hundred six dollars and thirty-seven cents ($1,140,806.37), together with interest as provided by law, in case No. 252-63.

BY THE COURT

/s/ Wilson Cowen
WILSON COWEN
Chief Judge

Dec 2 1966

APPENDIX C

Sections 901(a) and (b)(1) and 903 of the Internal Revenue Code of 1954 (26 U.S.C.) provide:

SEC. 901. TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES.

(a) *Allowance of Credit.*—If the taxpayer chooses to have the benefits of this subpart, the tax imposed by this chapter shall, subject to the limitation of section 904, be credited with the amounts provided in the applicable paragraph of subsection (b) plus, in the case of a corporation, the taxes deemed to have been paid under section 902. Such choice may be made or changed at any time prior to the expiration of the period prescribed for making a claim for credit or refund of the tax against which the credit is allowable. The credit shall not be allowed against the tax imposed by section 531 (relating to the tax on accumulated earnings), against the additional tax imposed for the taxable year under section 1333 (relating to war loss recoveries), or against the personal holding company tax imposed by section 541.

(b) *Amount Allowed.*—Subject to the limitation of section 904, the following amounts shall be allowed as the credit under subsection (a):

(1) *Citizens and domestic corporations.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * *

[26 U.S.C. (1958 ed.) 901.]

SEC. 903. CREDIT FOR TAXES IN LIEU OF INCOME, ETC., TAXES.

For purposes of this subpart and of section 164 (b), the term "income, war profits, and excess profits taxes" shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States.

[26 U.S.C. (1958 ed.) 903.]

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.903-1 *Definition of taxes in lieu of income, war profits, or excess profits taxes.*

(a) *In general.* For the purposes of subpart A (section 901 and following), part III, subchapter N, chapter 1 of the Code, and section 164 (b) (6), the term "income, war profits, and excess profits taxes" includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if—

(1) Such country or possession has in force a general income tax law,

(2) The taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and

(3) Such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

(b) *Example.*—The application of section 903 may be illustrated by the following example:

Example.—The A Corporation does business in X country, which imposes an income tax upon substantially a taxable income base. The ascer-

tainment of taxable income, though not the determination of gross income, from sources in X country is found administratively difficult. The X country by decree, provides that corporations circumstanced as was the A Corporation would, in lieu of the income tax at the rate of 20 percent otherwise payable, be subject to tax at the rate of 10 percent upon the amount of gross income from X country. In accordance with such decree the A Corporation paid X country the sum of $25,000 in 1955 with respect to its tax liability to the X country for the year 1954. Such amount, subject to the applicable limitations, is available as a credit to the A Corporation as foreign income, war profits, or excess profits taxes against the United States tax liability for the year 1954.

[26 C.F.R., Sec. 1.903-1.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1203

UNITED STATES OF AMERICA,
Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The judgments which the petitioner now asks the Court to review were rendered in favor of the respondent ("Prudential") by the United States Court of Claims in seven consolidated suits for refund of federal income tax for the years 1950 through 1956. The opinion is reported at 337 F.2d 651 (1964) (herein "the second *Prudential* case").

Judgment by the same Court for Prudential in a prior case involving the same issue for 1949 is reported at 319 F.2d 161 (1963) ("the first *Prudential* case"). No petition was filed in that case either for rehearing or for a writ of certiorari and the amount of that judgment has been paid.

By petition filed March 13, 1967 (No. 1144, this Term), petitioner is also seeking review of a decision by the Court of Claims in favor of The Equitable Life Assurance Society

of the United States ("Equitable") involving the identical issue for the years 1950 through 1955. That decision is reported at 366 F.2d 967 (1966) ("the *Equitable* case").

Jurisdiction

On October 16, 1964, the Court of Claims in this case granted Prudential's motion for partial summary judgment that it was entitled to recover on the foreign tax credit issue, the sole issue involved in this petition for certiorari. No petition for rehearing or for writ of certiorari was filed at that time. After trial and subsequent settlement of all other issues, the Court of Claims on December 2, 1966, pursuant to stipulation of the parties, entered judgments as to the amounts to be recovered (Petition, p. 12). No petition for rehearing was filed. The petition for writ of certiorari was filed on March 30, 1967.

Statutes and Regulations Involved

Section 131(a) of the 1939 Code and section 901 of the 1954 Code[1] each allow a credit against United States federal income tax for foreign "income, war profits, and excess profits taxes".

Section 131(h) of the 1939 Code and section 903 of the 1954 Code provide that "the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country. . . ."

Section 205 of the 1939 Code and section 841 of the 1954 Code provide that domestic insurance companies are

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[1] The Internal Revenue Code of 1939, as amended, governs the plaintiff's Federal income tax liability for the years 1950 through 1953. The Internal Revenue Code of 1954, as amended, applies to the years 1954 through 1956. The provisions of the two Codes relevant to the issue involved are substantially identical.

entitled to credits for foreign taxes to the same extent as other domestic corporations.

Section 29.131-2 of the Treas. Reg. 111 (applicable in 1950 and 1951)[2] provides in part as follows:

> "* * * the term 'income, war-profits, and excess-profits taxes' includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if
>
> (a) such country or possession has in force a general income tax law,
>
> (b) the taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and
>
> (c) such general income tax is not imposed upon the taxpayer thus subject to such substituted tax."

Question Presented

Whether, as the Court of Claims held, Prudential was entitled to a credit for Canadian premiums taxes under the provisions of the Internal Revenue Code that allow a credit for foreign income taxes and taxes paid in lieu of income taxes otherwise generally imposed.

Statement of the Case

Prudential is, and was during each of the years involved, a mutual life insurance company incorporated in the State

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[2] Substantially identical provisions were contained in section 39.131(h)-1(b) of Tres. Reg. 118 (applicable in 1952 and 1953) and section 1.903-1(a) of Treas. Reg. (1954 Code) (applicable in 1954 and subsequent years).

of New Jersey and doing business in the United States and Canada.

With respect to premiums received from the Province of Ontario, Prudential paid premiums taxes for 1950 and 1951 to Ontario. With respect to premiums received from Quebec, Prudential paid premiums taxes for 1950 through 1956 to Quebec. With respect to premiums received from the other Provinces, as a result of so-called Tax Rental Agreements between such provinces and the Dominion, Prudential paid premium taxes for 1950 through 1956 to the Dominion.[3] Each of the three jurisdictions to which Prudential paid premium taxes also imposed a tax on the net income of corporations generally. Each of the three jurisdictions specifically exempted mutual life insurance companies from the general corporate income tax.

Under section 14(1) of The Corporations Tax Act of Ontario (Rev. Stat. of Ont. 1950, c. 72, as amended)[4] a net income tax was imposed on "every incorporated company" with an office, assets or business in Ontario, except "as in this section otherwise provided". Section 14(3) of the same Act provided:

> "(3) The tax imposed under this section shall not be imposed on any incorporated company,
>
> . . . . . .
>
> "(i) that pays taxes under this Act as a[n] . . . insurance company . . ."

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[3] Under the Tax Rental Agreements, the "renting" provinces agreed to suspend certain taxes, including their premiums taxes and corporation income taxes, in return for compensation by the Dominion. Ontario joined the renting provinces for 1952 through 1956.

[4] The texts of relevant provisions of the statutes of Ontario, Quebec, and the Dominion of Canada, as in effect in each of the years in question, are attached as exhibits to the petitions filed by respondent in the Court of Claims to initiate these actions.

The only tax payable under this act by insurance companies was imposed by Section 4(1) and (2) which provided that every insurance company should pay a tax of 2% calculated upon the gross premiums received during the fiscal year from Ontario.

The Quebec statute differed from that of Ontario in form only. Section 6 of the Quebec Corporation Tax Act (11 Geo. 6, c. 33 (1947)) imposed a tax of 7% on the net income of

> "... every company, partnership or person contemplated by subdivisions 1, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18 and 19 of section 3, ..."

Subdivision 1 of Section 3 of the Act applied to

> "... every incorporated company ... not otherwise specially taxed under the following subdivisions of this section 3."

Subdivision 3 of Section 3 imposed

> "In the case of every insurance company, a tax of two percentum on every premium received by the company ... in Quebec."

The Dominion of Canada, by section 36 of The Income Tax Act (11-12 Geo. 6, c. 52 (1948), as amended), imposed a tax on the net income of corporations generally. This Income tax would have applied to Prudential were it not for the specific provision of section 29 of the Act which exempted from tax the income of life insurance companies except for

> "... the aggregate of the amounts credited to shareholders' account or otherwise appropriated for or on account of shareholders during the year ..."

Mutual life insurance companies like the respondent, having no shareholders, were thus exempt from the income tax.

They were, however, subject to a 2% premiums tax imposed by section 14(1) of the Dominion Excise Tax Act (Rev. Stat. of Can. 1927, c. 179, as amended). A credit was provided against the Dominion premiums tax for premiums taxes paid to non-renting provinces.

As stated in greater detail in Equitable's brief in No. 1144, pp. 4-5, the Dominion premiums tax as applied to life insurance companies was first imposed in 1941. It derives from the provincial premiums taxes that were all suspended during the war along with all provincial corporate income taxes pursuant to what were first known as the Wartime Tax Agreements. Prior to these agreements with the provinces, mutual life insurance companies were not subject to tax at the Dominion level on either their life insurance premiums or their income.

Reasons Why the Petition Should Be Denied

Neither the petition in the *Equitable* case (No. 1144) nor the petition here discloses any grounds for review by this Court of either of the two Court of Claims decisions. Respondent urges that none exists. The correctness of the result is evident from the opinions below. The respondent is vigorously opposed to the petitioner's suggestion (p. 4) that final disposition of this case should be further delayed.

1. In its overly zealous efforts to find a question of law to present for review, petitioner has again, as in No. 1144, misstated the basis of the Court of Claims decisions. According to petitioner, the question is whether a "mere" showing of exemption from income tax is sufficient to qualify the premiums tax as one paid "in lieu of" the income tax. (Petition here, p. 3; Petition in No. 1144, pp. 6, 8, 10). As demonstrated in Equitable's brief in opposition in No.

1144,[5] it is perfectly obvious from reading the two opinions below that no such question exists in these cases. Neither Prudential nor Equitable has ever argued for the proposition complained of nor was it adopted or relied on by the Court of Claims.

Petitioner points to no real controversy either as to the plain meaning of the foreign tax credit provisions of the Internal Revenue Code or as to the propriety of applying the tests specified in the Government's own regulations. Three times the Court of Claims has carefully examined all of petitioner's evidence, read its briefs and listened to its oral arguments. Three times it has unanimously found that a close connection did exist between the income tax exemptions and the premiums tax liabilities and that the premiums taxes paid by Prudential and Equitable were, therefore, indeed paid in lieu of the income taxes otherwise generally imposed by the taxing jurisdictions.

Thus, in reality, all petitioner seeks here is another review of the facts. Not content with the three "days in court" it has already had, petitioner would have this Court review the voluminous documentary exhibits and hundreds of pages of testimony relating to income, premiums and other taxes applicable to an unrelated variety of categories of taxpayers in the Dominion and all of its Provinces over a half a century, in the fond hope that this material, which failed to convince a single one of the seven Court of Claims judges that have considered it, will be found by this Court to compel a conclusion that the premiums tax liabilities and income tax exemptions were unconnected.

2. In its *Equitable* petition (No. 1144, p. 10, n. 7), petitioner concedes the lack of conflict among the decided cases.

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[5] Prudential concurs in the reasons advanced by Equitable for denying the writ.

The footnote itself reveals that petitioner's failure to obtain a conflict is not for lack of effort or opportunity but for lack of merit. It complains that unless the writ is granted, it will not be able to litigate this issue any more. Disappointing as this may be to the petitioner, surely it is not undesirable that there be some limit on the number of times the Government can force taxpayers to try and retry this issue, particularly where petitioner's repeated efforts have been universally unsuccessful.

3. Prudential respectfully submits that the correctness of the result in the *Prudential* and *Equitable* cases is fully apparent from the text of the lower court's opinions. As Judge Durfee points out in *Equitable* (Petition in No. 1144, p. 25), allowance of credit for the Canadian taxes in question will fulfill the precise purpose for which the foreign tax credit provisions were enacted. There has never been any doubt or controversy about the purpose of these provisions.[6] As the holdings of the Court of Claims are strictly limited to the taxes paid by mutual life insurance companies in the years and jurisdictions in question, petitioner's characterization of the result as the creation of a loophole is totally unjustified.[7]

4. It would be most inappropriate not to dispose of this case at the same time as No. 1144. Judgment on Prudential's right to recover here was entered October 16, 1964.[8]

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[6] *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1 (1932); Report of the Senate Committee on Finance on the Revenue Act of 1942, S. Rep. No. 1631, 77th Cong., 2d Sess. 131-132 (1942), 1942-2 C.B. 504, 602.

[7] Revenues are protected against excessive foreign tax credits by statutory limits provided in section 131(b) (1939 Code) and section 904 (1954 Code). Congressional reliance on these limits is evident in S. Rep. No. 1631, *supra*, n. 6.

[8] The timeliness of the petition here is debatable but the Court appears to have resolved this point in petitioner's favor in *United States* v. *Carlo Bianchi & Co.*, 371 U.S. 939 (1962).

Though all other issues were settled by agreement accepted July 15, 1966, entry of final judgment was deferred at petitioner's request until the Court of Claims could hear the *Equitable* case. Further postponement of final disposition of this case is surely unwarranted.

Conclusion

Prudential urges that the Prudential and Equitable petitions should both be denied without delay and that, in no event, should the cases be disposed of other than concurrently.

Respectfully submitted,

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